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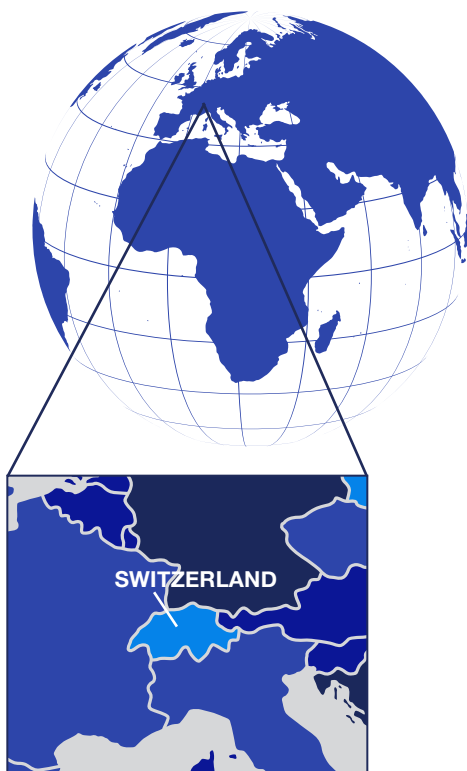
Switzerland [Mitigating Covid-19: The Swiss Federal Constitution and Elusion of Political Responsibility]

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ZORA URL: <https://doi.org/10.5167/uzh-209744>
Book Section

Originally published at:

Reich, Johannes (2021). Switzerland [Mitigating Covid-19: The Swiss Federal Constitution and Elusion of Political Responsibility]. In: Albert, Richard; Landau, David; Faraguna, Pietro; Drugda, Simon. 2020 Global Review of Constitutional Law. Boston, MA: FSU College of Law, 293-298.



Switzerland

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I. INTRODUCTION: CURBING COVID-19 CONSTITUTIONALLY AND THE ELUSION OF POLITICAL RESPONSIBILITY

1. *Federal Epidemics Acts: three-tier approach*

When COVID-19 reached Switzerland at the end of February 2020, the *Federal Act of 28 September 2012 on Combating Communicable Human Diseases* (Epidemics Act, EpA)¹ had been in place for more than four years. Previously, the EpA, whose aim is to ‘prevent and combat the outbreak and spread of communicable diseases’², was subject to intense political debates culminating in a referendum on 22 September 2013.³ After 60% of voters approved the bill, the EpA entered into force on 1 January 2016. The EpA set a *three-tier approach* in place, distinguishing between ‘normal’, ‘special’ and ‘extraordinary’ epidemiological situations. Accordingly, an aggravation of the epidemiological circumstances leads, based on a respective decision by the executive branch of the federal government (Federal Council) to a transfer of governmental tasks and responsibilities from the cantons (constituent states) to the Federation (federal government) on the one hand and from Federal Parliament (legislative branch) to the Federal Council (executive branch) on the other hand. The more the epidemiological situation escalates,

the more power is being concentrated in the *Federal Council*. According to the EpA, a ‘special situation’ exists when the authorities responsible for the prevention and combating of communicable diseases prove unable to prevent the outbreak and spread of such diseases, resulting in either an increased risk of infection and spread, a particular threat to public health or detrimental effects on the economy or on other areas of life.⁴

A ‘special situation’ also exists should the World Health Organization (WHO) identify an international health emergency threatening the health of the population in Switzerland. Such a ‘special situation’ allows the Federal Council, after consulting the cantons, to order ‘measures’ aimed at individuals or at the population as a whole to require doctors and other health professionals to participate in the fight against communicable diseases and to declare vaccinations compulsory for particular vulnerable groups of persons.⁵ The most aggravated state of affairs – the ‘extraordinary situation’ – allows the Federal Council ‘to impose the necessary measures for all or part of the country’, without consulting the cantons.⁶ Despite these sweeping powers, the EpA remains silent as to the definition of an ‘extraordinary situation’. In his dispatch to the Federal Parliament on the EpA, the Federal Council stated that the relevant clause is but a declaration of the emergency powers the executive branch of the federal government holds under the

¹ “Federal Act on Combating Communicable Human Diseases” (Epidemics Act, EpA), Classified Compilation of Swiss Federal Law (SR) 818.101. Available at: <<https://www.fedlex.admin.ch/eli/cc/2015/297/fr>> (official French version), (28 September 2012).

² Ibid, article 2 section 1 (outlining the purpose of the Act).

³ See Swiss Federal Chancellery, ‘Federal Act on the Control of Communicable Human Diseases’. Available at: <<https://www.bk.admin.ch/ch/f/pore/rf/cr/2007/20071012.html>> (in German, French, and Italian).

⁴ EpA (n. 1 above) article 6 section 1a.

⁵ EpA (n. 1 above) article 6 section 2.

⁶ EpA (n. 1 above) article 7.

Swiss Federal Constitution (Federal Constitution)⁷. These powers allow the Federal Council ‘to enact orders and take decisions in order to counter existing or imminent disturbances seriously threatening either public order or external or internal security’⁸. All such orders ‘must be limited in time.’⁹ As in most other areas of federal law, it is generally for the cantons to implement the measures imposed by the Federal Council during both ‘special’ and ‘extraordinary’ situations.

2. The first wave: emergency loans as a public-private partnership

Based on this legal framework, the Federal Council declared the epidemiological situation to be ‘special’ and banned all large-scale events involving more than 1,000 people on 28 February 2020.¹⁰ On 16 March 2020, the federal executive branch went further and, amid the accelerated spread of COVID-19, proclaimed the ‘*extraordinary situation*’.¹¹ The Federal Council introduced stringent measures such as border checks and the closing of shops, restaurants, bars and entertainment and leisure facilities, prohibited public gatherings of more than five people and did not order but ‘recommended’ all citizens to stay home. When *administering emergency loans* to small businesses, the Federal Council, based on its constitutional emergency powers, took the unique approach to enter

into close collaboration with more than 120 Swiss commercial banks.¹² With a simple declaration of one page, small and mid-size enterprises could apply for an immediate and interest-free loan worth up to 10% of their annual revenue, capped at Swiss Francs (CHF) 500,000 (approx. United States dollars [USD] 560,000 or Euros [EUR] 460,000). These loans were provided by a Swiss bank, underwritten with a full credit guarantee on the amount by the federal government.

Of higher amounts up to CHF 20 million (approx. USD 22.3 million/EUR 18.4 million), 85% each were guaranteed by the federal government, charged at 0.5% interest and again provided by a Swiss commercial bank. Running the scheme through the existing network of commercial banks based on existing customer relationships proved crucial for the initial success of the program, as the banks could rely on both the credit history and data of their clients. Within a week, more than 70,000 small and mid-size businesses received a loan through this public-private partnership.¹³

Soon after the first wave of COVID-19 subsided towards the end of May 2020¹⁴ the Federal Council declared the ‘*extraordinary situation*’ to be terminated as of 19 June 2020, lifted most of the remaining restrictions, proclaimed the ‘special situation’ and thus

handed most of the tasks and responsibilities in controlling and combating COVID-19 back to the cantons.¹⁵ Regarding separation of powers at the federal level the extraordinary powers granted to the Federal Council to combat the COVID-19 epidemic are, as of 26 September 2020, enshrined in the ‘*Federal COVID-19 Act*’ decided by Federal Parliament on 25 September 2020 and passed as an emergency federal statutory law.¹⁶ As of 1 October 2020, the last relevant restrictive measure imposed by the Federation still in place – the ban on large-scale events for over 1,000 people – was lifted.¹⁷ With the benefit of hindsight, it is difficult not to acknowledge that most restrictions were lifted both *prematurely and hastily*.

3. The second wave: elusion of political accountability and blame-shifting

During the second half of October, the laboratory-confirmed cases, hospitalizations and deaths due to COVID-19 rose dramatically once again and peaked in mid-November 2020. This ‘*second wave*’ of the COVID-19 pandemic hit Switzerland worse than the first one. As of 19 February 2021, Switzerland accounted for 6,336 laboratory-confirmed cases and 106.42 deaths with a laboratory-confirmed COVID-19 infection per 100,000 inhabitants.¹⁸ Based on cumulative confirmed COVID-19 deaths per million

⁷ Swiss Federal Constitution (Federal Constitution), SR 101, (18 April 1999), Available at: <<https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>> (non-official English translation).

⁸ Federal Constitution (n. 7 above) article 185 section 3 sentence 1.

⁹ Federal Constitution (n. 7 above) article 185 section 3 sentence 1.

¹⁰ Federal Council, “Coronavirus: Federal Council bans large-scale events”, (28 February 2020), Available at: <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-78289.html>>.

¹¹ Federal Council, “Coronavirus: Federal Council declares ‘extraordinary situation’ and introduces more stringent measures”, (16 March 2020), Available at: <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-78454.html>>.

¹² See « Ordonnance sur l’octroi de crédits et de cautionnements solidaires à la suite du coronavirus », (25 March 2020), Available at: <<https://www.fedlex.admin.ch/eli/cc/2020/194/fr>>.

¹³ For an assessment see Sam Jones, “Swiss lead way with crisis loans to small businesses”, Financial Times, republished at SWI Swissinfo.ch, (6 April 2020). Available at: <https://www.swissinfo.ch/eng/business/covid-19_swiss-lead-way-with-crisis-loans-to-small-businesses/45670144>.

¹⁴ For official data on COVID-19 in Switzerland and Liechtenstein see Swiss Federal Office of Public Health (FOPH), “Status report: Switzerland and Liechtenstein”, Available at: <<https://www.covid19.admin.ch/en/overview>>.

¹⁵ Federal Council, “Coronavirus: Move towards normalisation and simplified basic rules to protect the population”, (19 June 2020), Available at: <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-79522.html>>.

¹⁶ “Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19 Epidemic (COVID-19 Act)”, SR 818.102, (25 September 2020), Available at: <<https://www.fedlex.admin.ch/eli/cc/2020/711/en>> (non-official English translation).

¹⁷ See FOPH (n. 14 above), “Table on the easing and tightening of measures”, (15 December 2020), Available at: <https://www.bag.admin.ch/dam/bag/en/dokumente/mt/k-und-i/aktuelle-ausbrueche-pandemien/2019-nCoV/covid-19-tabelle-lockerung.pdf.download.pdf/Easing_of_measures_and_possible_next_steps.pdf> (with an overview of all the measures imposed and lifted at the federal level between 27 April and 30 November 2020).

¹⁸ See FOPH (n. 14 above).

persons, Switzerland, as of February 2021, fared worse during the entire pandemic than neighboring Austria and Germany yet slightly better than France and Italy.¹⁹ In view of *mounting discontent with the considerable powers of the Federal Council* under the EpA, both on the part of the political parties and the cantons, the federal executive branch shied away from reintroducing the ‘extraordinary situation’ and left the ‘*special situation*’ in place instead. The Federal Council thus might still impose measures aimed at individuals or at the population but is under an obligation to consult the cantons beforehand.²⁰ Furthermore, each canton could enact its own additional measures. Still, the small scale of Swiss federalism – 26 cantons are assembled on less than 42,000 km² inhabited by 8.7 million people – prompted many executive branches of the cantons, whose members are all elected directly by the people, to refrain from unilaterally imposing more restrictive and often unpopular measures despite increasing case numbers on their territory.

4. The silence of the courts

In spite of the severe restrictions of fundamental rights, courts have played a subordinate role at best during the pandemic. Although the Federal Court, Switzerland’s highest court, had to adjudicate a number of appeals against measures to combat COVID-19 these proved to be manifestly unfounded to the extent that the court entered into the merits of the appeals at all. In contrast, some administrative courts of the cantons did in fact rule on the delimitation of the

emergency powers of the executive branches of the cantons.²¹ The Administrative Court of the Canton of Zurich held that the requirement to wear hygiene masks in shops and shopping centers did not constitute an impermissible interference with fundamental rights.²² Based on federal constitutional law, one can identify *three major reasons for the courts’ silence*: First, ordinances of the Federal Council may not be challenged in courts as such,²³ although specific sanctions imposed by officials based on these ordinances such as arrests or fines may indeed be contested. Second, the Federal Court largely deferred to the Federal Council in its past decisions defining the limits of executive emergency powers.²⁴ Third, the Federal Constitution commits all courts to adhere to federal statutory law, even in the event of a conflict with the Federal Constitution.²⁵

5. Preliminary assessment: diffusing political accountability by direct democracy, federalism, separation of powers, and collegiate executive branches

Georg Wilhelm Friedrich Hegel observed in 1820 that the ‘owl of Minerva begins its flight only with the falling of dusk’²⁶, pointing to the fact that phenomena can only be explained and evaluated once they have passed and become history. To the extent that a preliminary assessment of coping with COVID-19 from the perspective of constitutional law may nonetheless be reasonably ventured even before the pandemic has subsided; the *main conclusion* might be that the alignment of Switzerland’s political system towards consensus and integration of

linguistic, confessional and socio-economic minorities within the country, as underpinned by the Federal Constitution and as a salient advantage of the Swiss political system, comes at the price of the *diffusion of political accountability*. Direct democracy, federalism, the separation of powers between Federal Parliament and the Federal Council as well as the collegial decision making and interaction within the executive branches at both federal levels (Federation, cantons) all provide politicians not only with *loopholes to evade political accountability*, but also rhetorical munition to *shift blame* onto other actors within the political realm.

Owing to the Swiss system of *direct democracy*, 50,000 citizens are entitled to launch a referendum against any federal statutory law approved by Federal Parliament.²⁷ Empirically, such ‘optional referenda’ are launched against around a mere 6% of all the legislative acts that are constitutionally subject to this institution of direct democracy.²⁸ Roughly half of all federal acts actually put to an ‘optional referendum’ have been vetoed at the ballot box since 1874.²⁹

This considerable political uncertainty posed by the optional referendum creates strong incentives to seek broad parliamentary consensus on important policy issues and forms a major factor of Switzerland’s transformation from a majoritarian to a consensus democracy. Consensus democracy, however, also offers incentives to politicians to avoid political responsibility by passing on sensitive issues like a hot potato. Decisions at the ballot box on bills or treaties are very rarely

¹⁹ See Our World in Data, “Switzerland: Coronavirus Pandemic Country Profile”, (21 February 2021), Available at: <<https://ourworldindata.org/coronavirus/country/switzerland?country=~CHE>>.

²⁰ See EpA (n. 1 above) article 6 section 2.

²¹ Administrative Court of the Canton of Zurich, decision AN.2020.00004, (25 May 2020), Available at: <<https://www.zh.ch/de/politik-staat/streitigkeiten-vor-verwaltungsgericht/rechtsprechung-des-verwaltungsgerichts/urteile-in-der-entscheidungsdatenbank-suchen.html>>.

²² Ibid., decision AN.2020.00016, (3 December 2020).

²³ Federal Constitution (n. 7 above) article 189 section 4.

²⁴ See, e.g., Federal [Supreme] Court, decision BGE 123 IV 29 section 3b, (10 January 1997), Available at: www.bger.ch.

²⁵ Federal Constitution (n. 7 above) article 190; see Johannes Reich, «Verhältnis von Demokratie und Rechtsstaatlichkeit» in Oliver Diggelmann et al. (eds.), *Droit constitutionnel suisse*. Vol. 1, Schulthess, (2020), 333-55, Available at: <https://doi.org/10.5167/uzh-184637>.

²⁶ Georg Wilhelm Friedrich Hegel, «Grundlinien der Philosophie des Rechts», (1820; Suhrkamp 1986), 28 (translation by the author).

²⁷ Federal Constitution (n. 7 above), article 141 sections 1a&d.

²⁸ Alexander H. Trechsel & Pascal Sciarini, “Direct democracy in Switzerland: Do elites matter?”, 33 *European Journal of Political Research* 99, (1998), 103-4.

²⁹ Adrian Vatter, “Das politische System der Schweiz”, 3rd ed., Nomos, (2017), 370.

framed as a vote of no confidence in a member of government. Since 1959 not a single member of the Federal Council has resigned after a referendum that did not go according to his or her preferences.

Furthermore, due to the small-scale structure of Swiss *federalism*, a single canton has little incentive to unilaterally take potentially unpopular decisions. As many persons live and work in different cantons, each government of a canton can reasonably claim that a unilateral decision would be ineffective and thereby shift the burden to take unpopular decision upon the federal government.

All members of the Federal Council are elected by Federal Parliament for a *fixed period* of four years.³⁰ Owing to the lack of a vote of no confidence or a recall, political parties and their members of Federal Parliament face little pressure to fall in line with decisions taken by the Federal Council or to support them in public. With regard to the *separation of powers* between the Federal Council and Federal Parliament, the Federal Constitution merely provides that ‘significant’ and ‘fundamental’ provisions must be part of statutory federal law.³¹ Such law generally rests outside the scope of judicial review.³² In view of the powers granted to the Federal Council by the EpA,³³ this provides members of parliament with the opportunity to put pressure on the executive branch by threatening to overrule ordinances enacted by the Federal Council and to take credit for any adjustments, while avoiding any political accountability for such decisions.

The executive branches of both the cantons and the Federation are *collegiate bodies* consisting of an uneven number of members with identical rights and responsibilities.³⁴

Decisions are taken, to the extent possible, by consensus and all of the members of the executive are expected to faithfully represent and implement the decisions by the majority. Ideally, such structures lead to positive instead of mere negative coordination³⁵ and thus to better informed decisions. At the same time, each member of the executive branch is provided with an opportunity not only to hide behind the collegium but to cautiously distance him- or herself from the collective decisions or to leak his or her opposition to the media.

The COVID-19 pandemic thus highlighted that the merit of Swiss constitutional law in establishing consensus between linguistic, confessional, and cultural minorities has its shadows. It allows the cantons, members of the federal parliament and political parties to *shirk political responsibility* and *shift political blame onto other actors* instead.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS: GENERAL ELECTION OF THE SWISS FEDERAL PARLIAMENT

Swiss citizens were called to the ballot boxes three times in 2020 to decide upon nine subjects.³⁶ None of the proposed four amendments to the Federal Constitution, all of them popular initiatives, achieved the necessary majority of both the voters and the cantons.³⁷ The popular initiative ‘*For responsible businesses – to protect people and the environment*’, was launched by a broad coalition of left-leaning parties, NGOs, and charitable organizations and brought forward a constitutional amendment to commit all companies with registered offices or headquarters in Switzerland to adhere to “in-

ternationally recognized human rights and international environmental standards” both in Switzerland and abroad and to ensure that these standards are “respected by the businesses under their control”.

These obligations would have been made enforceable through torts claims before Swiss courts. The initiative was supported by 50.73% of voters but failed to gain a majority of the cantons and was thus rejected. The popular initiative ‘*For moderate immigration (limitation initiative)*’, which would have ended free movement of persons with the members-states of the EU and the European Economic Area, met the same fate. The popular initiative was roundly rejected by 61.7% of voters and more than 80% of the cantons. As popular initiatives seeking to commit the Federation to ‘*promote the supply of affordable rental housing*’ and to bar the Swiss National Bank, Switzerland’s central bank, and pensions funds from ‘*financing producers of military equipment*’ were both defeated, the Federal Constitution remained unaltered in 2020.

III. CONSTITUTIONAL CASES: JUDICIALIZATION OF POLITICS, ISLAMIC HEADSCARVES, AND HOMESCHOOLING

*1. Association ‘Senior Women for Climate Protection’ et al. vs. Federal Council et al.: climate change litigation on its way to the European Court of Human Rights*³⁸

‘Senior Women for Climate Protection’ (SEPO), an association under Swiss law, whose roughly 1,800 members are all female and on average 73 years old, and four of its members filed a motion seeking to commit the Federal Council and three federal admin-

³⁰ Federal Constitution (n. 7 above) article 175 section 2 sentence 1.

³¹ Federal Constitution (n. 7 above) article 164 section 1.

³² See section I/3 at n. 25.

³³ See section I/1 above.

³⁴ See, e.g., Federal Constitution (n. 7 above), articles 175 and 177 sections 1.

³⁵ Fritz W. Scharpf, ‘Komplexität als Schranke der politischen Planung’ in PVS 4/1972: Gesellschaftlicher Wandel und politische Innovation (VS 1972) 168, 173-5 (on positive and negative coordination).

³⁶ On all federal popular votes since 1848 see Federal Chancellery, ‘Chronology of referenda. Available at: <https://www.bk.admin.ch/ch/d/pore/va/vab_2_2_4_1.html>.

³⁷ Federal Constitution (n. 7 above) article 140 section 1a & article 142 sections 2-4.

³⁸ Federal Court (n. 24 above) decision 146 I 145 (5 May 2020). Available at: <www.bger.ch>.

istrative agencies to take more stringent climate action in such a way that Switzerland's contribution to global emissions of greenhouse gases (GHGs) would be in line with the aim of the 2015 Paris Agreement to hold 'the increase in the global average temperature to well below 2 °C above pre-industrial levels'³⁹. According to SEPO, this would mean reducing domestic GHG-emissions by at least 25 percent by 2020 compared with 1990 levels, instead of 20 percent as prescribed in federal statutory law. SEPO argued that the federal government, both by refraining from initiating a revision of the allegedly too lenient climate legislation and by ostensibly displaying undue restraint in implementing the statutory provisions, failed to meet the positive obligations deriving from the right to life and the right to respect for private and family life enshrined in both the Federal Constitution and the European Convention on Human Rights (ECHR). SEPO claimed that elderly women were significantly more and adversely affected in their invoked human rights by higher temperatures and heat waves caused by GHG-emissions.

On behalf of the Federal Council, the federal administration held *not to consider SEPO's claim on its merit*. The Federal Administrative Court (appellate court) and – on 5 May 2020 – the Federal Court both *affirmed* this decision.⁴⁰ The latter court held that the reprimanded omissions by the federal authorities would 'at the present time' fail to impair the complainants' rights to life and to respect for private and family life to the extent required by the Administrative Procedure Act in order to vindicate legal remedy. Having exhausted all domestic remedies, SEPO and four of its members filed an application with the European Court of Human Rights (ECtHR) on 26 November 2020. SEPO's motion thus arguably constitutes the first case of cli-

mate change litigation reaching the ECtHR in strict compliance with the admissibility criterion according to which the 'Court may only deal with the matter after all domestic remedies have been exhausted'⁴¹.

2. *Vischer et al. vs. Grand Council of the Canton of Basel-City et al.: fundamental rights for non-human primates or mere 'constitutional virtue signaling'*?⁴²

In the canton of Basel-City, a hub of life-science industry where pharmaceutical giants such as Novartis and Roche are headquartered, a popular initiative was submitted with the aim of amending the constitution of the canton with the following passage: 'This constitution guarantees [...] the *right of non-human primates to life and to physical and mental integrity*'. The Grand Council of the Canton of Basel-City (Parliament) declared the initiative invalid owing to its alleged inconsistency with federal law, which takes precedence over any law of a canton.⁴³ The Court of Appeal of the canton overturned this decision. On further appeal, the Federal Court upheld this previous decision. The popular initiative 'basic rights for non-human primates' will thus be put to a popular vote. The Federal Court reasoned that the cantons are, in their own constitution, allowed to guarantee fundamental rights beyond the minimum standard set by both the Federal Constitution and the ECHR. The Federal Court emphasized that the initiative did not call for the application of existing fundamental rights applicable to humans to animals, but rather for the introduction of *new rights reserved for non-human primates only*. The Federal Court further underscored that fundamental rights would primarily, if not exclusively, grant protection against the government of the canton and its administration. Fundamental rights enshrined in

the constitution of the Canton of Basel-City would therefore be directed against the authorities of the canton, including the University of Basel and the University Hospital of Basel, and of its municipalities, even though these entities currently neither own nor keep non-human primates. The Federal Court stressed that private law legislation forms an exclusive federal power. Subjects of private law, in particular life-science industry with its laboratories and other private research institutions, would therefore *not be bound* by the constitutional amendment the popular initiative advanced. As a result, the constitutional amendment would *largely fail to create any third-party effects among private entities*. Against this backdrop, the decision of the Federal Court illustrates the favorable conditions for regulatory experimentation and innovation that the interaction of federalism and popular initiatives creates. Still, the popular initiative, if approved, would essentially be reduced to what may be coined '*constitutional virtue signaling*' but largely fail to be of practical relevance.

IV. LOOKING AHEAD

On 7 March 2021, Swiss citizens will be called to the ballot box to decide on the *popular initiative 'Yes to the Veiling Ban'* seeking to prohibit all face covering in public places and in places opened to the public, with the exception of places of worship. Despite its neutral wording, the initiative primarily seeks to outlaw wearing specific Islamic female dresses, in particular the burqa and the niqab, in public. On 13 June 2021, citizens will vote on the referendum against the 'Federal COVID-19 Act' which was passed as an emergency federal statutory law and enacted immediately before an optional referendum could take place.

³⁹ Paris Agreement (12 December 2015; ratified by Switzerland on 6 October 2017), article 2 section 1a.

⁴⁰ For a critical assessment see Johannes Reich, Case Note, 121 (2020) Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht, 489-507. Available at: <<https://doi.org/10.5167/uzh-190231>>.

⁴¹ ECHR, article 35 section 1.

⁴² Federal Court (n. 24 above) decision 1C_105/2019 (10 January 1997). Available at: <www.bger.ch>.

⁴³ See Federal Constitution (n. 7 above) article 49 section 1.

V. FURTHER READING

Johannes Reich, ‘Verhältnis von Demokratie und Rechtsstaatlichkeit’ [Relationship between democracy and the rule of law] in Oliver Diggelmann et al. (eds.), *Droit constitutionnel suisse* (Schulthess 2020), pp. 333-355. Available at: <<https://doi.org/10.5167/uzh-184637>>.